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In The

Supreme Court of the United States

October Term, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, Industrial Commissioner of the New York State Department of Labor, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., State Commissioner of Taxation and Finance,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* FOR ROCHESTER TELEPHONE CORPORATION, GENERAL ELECTRIC COMPANY, OTIS ELEVATOR COMPANY, AMERICAN BROADCASTING COMPANIES, INC., NATIONAL FUEL GAS DISTRIBUTION CORPORATION, ANACONDA COMPANY, BRASS DIVISION, TALLEY INDUSTRIES, INC., BUFFALO FORGE COMPANY, GRINNELL CORPORATION, ASSOCIATED INDUSTRIES OF NEW YORK, INC., EMPIRE STATE CHAMBER OF COMMERCE, INC. AND THE NEW YORK CHAMBER OF COMMERCE & INDUSTRY

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PRELIMINARY STATEMENT

Pursuant to Rule 42(2) of the Revised Rules of the Supreme Court, the *amici curiae* respectfully submit this brief in support of the Appellants' position. The written consent of the parties for the submission of this brief has been obtained and has been filed with the Clerk of the Court.

INTEREST OF THE *AMICI CURIAE*

The question before the Court is whether New York State's grant of unemployment insurance benefits to strikers is preempted by the National Labor Relations Act, *as amended*, 29 U.S.C. §§ 141 *et seq.* (hereinafter "Act" or "NLRA") and by the underlying policy of the Act which guarantees government neutrality in the collective bargaining process. The interest of each of the *amici* in the resolution of this issue is substantial.

In 1974-1975, Rochester Telephone Corporation (hereinafter "RTC"), a publicly held utility having no affiliation with the Bell System, experienced a six-month strike by the Communications Workers of America, Local 1170. After waiting seven weeks, approximately 1,000 of the striking employees applied for and received unemployment insurance benefits from the State of New York. The benefit payments resulted in a drain of RTC's individual unemployment insurance account of $2,291,990. As a result, RTC's unemployment insurance tax rate was increased substantially, and it is estimated that RTC eventually will be required to pay an additional $1,786,357 in unemployment insurance taxes because of the payment of benefits to strikers during the 1974-1975 strike.

In 1969-1970, General Electric Company (hereinafter "GE") experienced a three-month nationwide strike. Upwards of 14,000 of GE's employees in the State of New York applied for and received unemployment insurance benefits during the course of this strike. The benefit payments resulted in a drain on GE's individual unemployment insurance account of approximately $7,700,000. As a result, GE's unemployment insurance tax rate substantially increased. Between October 1, 1970 and September 30, 1974, GE paid an additional $6,224,000 in unemployment insurance taxes as a direct result of the payment of benefits to its striking employees in New York during the 1969-70 strike.

Between March 30, 1972 and July 8, 1972, Otis Elevator Company (hereinafter "Otis") was subjected to a nationwide

strike by its employees represented by the International Union of Elevator Constructors. Between July 1, 1972 and February 7, 1973, Otis was also subjected to a strike by its employees represented by Local No. 1 of the International Union of Elevator Constructors and employed within a 35-mile radius of the City Hall of the City of New York, except Monmouth, New Jersey, but including all of Long Island. During the course of these strikes approximately $1,200,000 in unemployment insurance benefits were paid to approximately 1,000 of Otis's striking employees who were employed in New York State. Otis's unemployment insurance tax rate increased from 1.2 percent in 1972 to 2.7 percent in both 1973 and 1974. As a result, Otis paid approximately $240,000 in increased taxes in 1974.

GE and Otis presently have pending before the District Courts of the Northern and Southern Districts of New York, respectively, suits to enjoin future payment of unemployment insurance benefits to strikers and to recoup the excess unemployment insurance taxes which they have paid. RTC has pending before the Unemployment Insurance Division of the New York State Department of Labor an administrative proceeding to recoup the excess contributions paid by it to the Unemployment Insurance Fund as a result of the payment of benefits to strikers. The court actions and the administrative proceeding are being held in abeyance pending the outcome of the case at bar.

American Broadcasting Companies, Inc. (hereinafter "ABC") was subjected to a strike by approximately 700 of its New York employees from May 19, 1977 to October 1, 1977. ABC brought suit in the Southern District of New York to enjoin the State from paying unemployment insurance benefits to its striking employees and from collecting from ABC increased unemployment insurance taxes as a result of any such payments. On June 30, 1977, Judge Canella issued an Order granting ABC's motion for a preliminary injunction. *American Broadcasting Companies, Inc. v. New York State Department of Labor*, Civ.

No. 77-2995 (S.D.N.Y. 1977). This decision was appealed by the State to the United States Court of Appeals for the Second Circuit. The same panel which issued the opinion herein on appeal stayed Judge Canella's order, so that $564,000 in benefits were paid to ABC's striking employees. That proceeding is being held in abeyance, pursuant to agreement between the State and ABC, pending the outcome of the case at bar.

In 1977, National Fuel Gas Distribution Corporation (hereinafter "National Fuel") underwent a four and one-half month strike by approximately 2100 of its production, maintenance, and clerical employees in the State of New York. All but a few of the striking employees applied for and received unemployment insurance benefits and a total of approximately $1,700,000 in those benefits were paid. The balance in National Fuel's employer account changed from approximately $1,722,000 before the strike to a minus balance of approximately $530,000 after the strike. National Fuel's unemployment insurance tax rate has also been increased by the Unemployment Insurance Division from the pre-strike minimum rate of 1.5% to 4.9% per year, an effective dollar increase in National Fuel's contribution of approximately $335,000 per year. National Fuel has formally protested the increase in the taxation rate.

The Anaconda Company, Brass Division (hereinafter "Anaconda") was subjected to a six-month nationwide strike from October 1, 1977 to April 3, 1978 by approximately 2350 of its hourly employees including approximately 525 New York employees. During the course of the strike, approximately $1,100,000 in unemployment insurance benefits were paid to striking employees in New York. Prior to the strike, weekly unemployment insurance benefits chargeable to Anaconda's industrial unemployment insurance account averaged approximately $1,600. After the seven week waiting period, chargeable weekly benefits exceeded $60,000. Although the

contract settlement ending the strike was approved by all Anaconda employees outside New York State by a margin of 974 to 398, New York employees rejected the settlement by a vote of 396 to 3. Moreover, although New York employees were contractually obligated to return to work on April 3, 1978 because the contract settlement had been ratified by a majority of the Anaconda employees voting nationwide, they chose to prolong the strike and returned to work on April 5, 1978 only after being ordered to do so by the international union.

On October 21, 1976, the employees of Russell Plastics Technology, Inc. (hereinafter "Russell"), a subsidiary of Talley Industries, struck a plant located in Lindenhurst, New York during the negotiation of their first collective bargaining agreement. The strike has not concluded at this date and 50% of the employees who originally struck have never returned to work, although many of them collected unemployment insurance benefits for the maximum entitlement period. During negotiations which took place over the course of the strike, union negotiators repeatedly told the company that the striking employees did not wish to return to work because they were receiving comparable benefits through a combination of unemployment insurance benefits and the union strike benefits. As a consequence of the strike, Russell's unemployment tax rate has increased 50%.

From 1974 through 1976 Buffalo Forge Company (hereinafter "Buffalo") experienced two strikes at its Buffalo, New York facility. The first, involving its officer workers, began on November 15, 1974 and continued until the United Steelworkers of America was decertified as their representative in December, 1975. The second involved production personnel and lingered on for nearly twenty weeks. Approximately 800 Buffalo employees in New York State applied for and received $1,766,682.23 in unemployment benefits during the course of these strikes. Consequently, Buffalo's unemployment tax rate

has increased from 2.1% in 1975 to 4.0% in 1978 after reaching 5.2% in 1977. It is estimated that Buffalo will eventually pay the full $1,766,682.23 in excess unemployment taxes. Buffalo has commenced an Administrative Proceeding before the Unemployment Insurance Division of the New York State Department of Labor seeking a refund of the excess contributions attributable to the 1974-1976 strikes. That proceeding is being held in abeyance pending a decision in this case.

In 1972, Grinnell Corporation (hereinafter "Grinnell") experienced a strike by Local 4756 of the United Steelworkers of America at its plant in Cranston, Rhode Island. After the statutory waiting period, the Rhode Island Department of Employment Security began to pay unemployment compensation benefits to the strikers under the Rhode Island statute expressly authorizing such payments. Gen. Laws R. I. 1956, §28-44-1 *et. seq.* The Rhode Island statute does not materially differ from the New York statute. Grinnell sued in the United States District Court for the District of Rhode Island to enjoin those payments. The District Court dismissed the action. The United States Court of Appeals for the First Circuit reversed and remanded the case for trial. *Grinnell Corporation v. Hackett,* 475 F.2d 449 (1st Cir. 1973). The trial is being held in abeyance pending a decision in this case.

Associated Industries of New York State, Inc. (hereinafter "Associated Industries") is a non-profit corporation organized under the laws of the State of New York, where it has served industry since 1914. It has approximately 2,700 member companies with offices and plants in all parts of the State. The membership includes both manufacturing and non-manufacturing firms which together account for billions of dollars in annual business activity.

Empire State Chamber of Commerce, Inc., (hereinafter "Empire") is a non-profit corporation organized under the laws of the State of New York. Empire represents local chambers of

commerce, business and trade organizations and associations, and individual companies. Its members, located throughout the State, span a broad cross-section of business activity. They are engaged in banking, insurance, commercial, industrial, manufacturing and professional activities, among others.

The New York Chamber of Commerce & Industry (hereinafter "New York Chamber") is a voluntary business association chartered by the State of New York. It is the oldest chamber of commerce in the United States, having been founded in 1768. The current general membership of the New York Chamber consists of over 2,500 business proprietorships, partnerships and corporations, representing the full spectrum of commerce and industry in the City and State of New York. This broad membership comprises businesses of all sizes engaged in virtually all branches of industry.

The combined membership of Associated Industries, Empire and the New York Chamber employs upward of 1,000,000 employees in New York State. Virtually all members are covered by the New York State Unemployment Insurance Law, and a substantial number bargain collectively under the NLRA. Bargaining is conducted under the policy that the government shall not interfere with the balance struck by Congress between the conflicting interests of the parties to a strike or other labor controversy. The interest of the membership, and therefore of the organizations, in any case involving a claim which could effect a departure from that policy is substantial.

SUMMARY OF ARGUMENT

The Second Circuit Court of Appeals has grievously erred in reaching its conclusion. It has drawn inferences concerning Congress's intent with respect to the payment of unemployment insurance benefits pursuant to statutes such as New York's,[1] from isolated bits of legislative history without regard for the breadth of the labor law pre-emption doctrine formulated so carefully by this Court to assure "a comprehensive national labor law . . . for equitably and delicately structuring the balance of power among competing forces so as to further the common good." *Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 286 (1971). In so doing, the circuit court committed two fundamental errors.

First, the court below failed to recognize that the decisions of this Court establishing the primacy of federal control of labor relations require that any state interference with federal labor policy may be permitted only where Congress has *affirmatively permitted* such interference. The court below accepted the fact that the payment of unemployment insurance benefits to strikers has a substantial impact upon collective bargaining. It improperly concluded, however, that such interference should be permitted, absent congressional intent to *prohibit* such interference. The court below, accordingly, reversed the standard with which it should have reviewed the legislative history,

[1] Section 592(1) of the New York Labor Law (McKinney 1977) provides for the payment of unemployment compensation to strikers after a "Suspension of accumulation of benefit rights":

> 1. Industrial controversy. The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed, except that benefit rights may be accumulated before the expiration of such seven weeks beginning with the day after such strike, lockout, or other industrial controversy was terminated.

resulting in a decision which — premised upon strained interpretations of disjointed and incomplete legislative history — will promote widespread state incursions into the collective bargaining process and will destroy the delicate balancing of labor-management relations effected by Congress and this Court.

Second, the court erred in finding that the evidence indicates that Congress intended to permit states to pay unemployment insurance benefits to strikers. Not only did it improperly infer evidence of intent from congressional inaction, but it arbitrarily failed to give *any* weight to explicit evidence indicating a contrary intent.

Because of these errors, the circuit court reached a decision that was directly contrary to the decisions of every other court which had considered the question. Since the court's erroneous decision has the potential for seriously undermining the entire process of unfettered collective bargaining which is "the fundamental premise on which the Act is based," *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970), it must be reversed.

ARGUMENT

POINT I

The New York statute interferes with the federal labor policy favoring free collective bargaining and is pre-empted unless the state can prove Congress intended such interference.

A. *Federal labor policy guarantees employers and employees the right to engage in the collective bargaining process free from governmental interference.*

This Court has established that Congress has regulated and occupied the field of labor-management relations "to the full extent of its Constitutional power...." *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998 v. Wisconsin Employment Relations Board*, 340 U.S. 383, 391 (1951). Congress did so in order to ensure "a comprehensive national labor law" as a result of "*the perceived incapacity of* common law courts and *state legislatures, acting alone*, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good." *Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. at 286 (emphasis added).

A fundamental principle of the comprehensive federal system of labor law is the policy of free collective bargaining. *Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959); *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). Under this mechanism for dispute settlement, the government "acts to oversee and referee the process of collective bargaining," but it is required to leave "the results of the contest to the bargaining strengths of the parties." *H.K. Porter Co. v. NLRB*, 397 U.S. at 108.

Economic power is one of the essential tools which Congress has provided for parties engaged in the collective bargaining process. *NLRB v. Burns Security Services*, 406 U.S. 272, 287 (1972); *American Ship Building Co. v. NLRB*, 380 U.S. 300, 309 (1965); *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 495 (1960). Indeed, the availability of economic force is a prime impetus for negotiating parties to reach an agreement. As this Court stated in *NLRB v. Insurance Agents' International Union, supra:*

> The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors — necessity for good faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms — exist side by side.

361 U.S. at 489. Because economic warfare is so fundamental a part of the bargaining process, the NLRA envisions a "free play of economic forces" which is simply not subject to state regulation. *Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 144 (1976).

In the absence of a clear and explicit direction in the federal legislation, not even the federal agency established to regulate labor-management relationships, the National Labor Relations Board, is free to "regulate the choice of economic weapons that may be used as part of collective bargaining," nor "to act at large

in equalizing disparities of bargaining power between employer and the union." *NLRB v. Insurance Agents' International Union*, 361 U.S. at 490.

B. *The New York statute violates the policy of a free play of economic forces.*

Central among the union's arsenal of economic weapons is the power to strike. Balanced against that power is the employer's ability to absorb or pass on financial losses occasioned by a strike. The sensitive balance between these two opposing economic powers is a pivotal element in the collective bargaining process.

It is beyond cavil, and indeed was expressly held by the court below,[2] that the record in the case at bar clearly demonstrates the significant influence upon collective bargaining exerted by the payment of unemployment insurance benefits to striking employees.[3] Direct subsidy for strikers provides a negotiating union's membership with the financial means to refrain from returning to work before their demands at the bargaining table are met. At the same time, since the strikers' subsidy is financed

[2] The Court of Appeals expressly recognized that there is a "... conflict between New York's statute and the broad federal policy of free collective bargaining ...." 566 F. 2d at 395.

[3] In fact, in a related case, the Supreme Court took judicial notice of the overwhelming influence upon collective bargaining of payments made to strikers through welfare assistance programs stating in *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 124 (1974):

> It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract.

Unemployment insurance benefits have an even more substantial financial impact upon the employer's position than do welfare benefits, for the former are available as of right to all strikers while the latter are granted only on the basis of need.

with the employer's funds, it saps strength from the employer's economic force by substantially increasing the costs associated with the strike.[4] Management negotiators clearly are motivated by the unemployment insurance scheme to accede to union demands before the strikers' benefits begin to accumulate, causing the employer's insurance fund to be depleted and insurance contribution rates to rise.[5] Thus, the challenged New York statute acts as a double-edged sword against a negotiating employer, at one time both draining management's strength and enhancing labor's.

C. *The doctrine of pre-emption compels invalidating the New York statute, unless there is affirmative evidence of congressional intent to permit strikers to receive unemployment insurance benefits.*

In recognition of the plenary authority exercised by Congress in labor relations, this Court has established that any state action that interferes with the policy of free collective bargaining is invalid. Thus, notwithstanding the absence of explicit congressional guidelines prohibiting state interference in labor disputes involving employers engaged in interstate commerce, this Court has developed and repeatedly applied the doctrine of federal labor law pre-emption to such disputes. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge*, 403 U.S. 274 (1971); *see* Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev.

[4] New York Labor Law Section 592(1) (McKinney 1977) grants strikers unemployment insurance benefits after a seven-week suspension period. Benefit payments are made from an unemployment insurance fund which, under New York Labor Law Section 570(1), is financed by the struck employer.

[5] An employer's experience rating determines the amount of its contributions to the fund. The rating has as its basis the sum remaining in the employer's individual account at the end of a year after contributions are credited and benefits paid are debited.

1337 (1972). Simply stated, the doctrine declares that "federal law pre-empts state remedies that interfere with federal labor policy or with specific provisions of the NLRA." *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 635 (1975). Accordingly, the federal courts have uniformly invalidated state action which has a significant direct or indirect impact upon the labor-management relations of parties subject to the NLRA. *See Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission, supra; Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, supra; Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Beasley v. Food Fair of North Carolina, Inc.*, 416 U.S. 653 (1974); *Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton*, 377 U.S. 252 (1964); *Oil, Chemical & Atomic Workers, Local 5-283 v. Arkansas Louisiana Gas Co.*, 332 F.2d 64 (10th Cir. 1964); *General Electric Co. v. Callahan*, 295 F.2d 60 (1st Cir. 1961), *cert. dismissed*, 369 U.S. 832 (1962).

Because of the pervasive policy of noninterference with the federal scheme of labor-management relations, exceptions to the doctrine of federal labor law pre-emption have been narrowly defined by this Court to include only those cases where (1) an activity regulated by the state was "a merely peripheral concern" of federal labor law, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959); (2) a state regulation "touched interests so deeply rooted in local feeling and responsibility that, in the absence of *compelling congressional direction*, [a court] could not infer that Congress had deprived the States of the power to act," *id.* at 244 (emphasis added); or (3) Congress *"affirmatively indicated"* that the states have the power to regulate, *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge, supra* (emphasis added). *See Malone v. White Motor Corp.*, 46 U.S.L.W. 4295 (April 3, 1978) (hereinafter *"White Motor"*); *Lodge 76, International Association of Machinsts & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. at 142-147 (and cases cited therein).

This Court's view of labor law pre-emption was aptly summarized by Professor Cox in his most recent article on the subject:

> [W]here the state law or rule of decision is based upon an accommodation of the special interests of employers, unions, employees, or the public in employee self-organization, collective bargaining, or labor disputes ... the likelihood that its application to persons under NLRB jurisdiction will upset the balance struck by Congress *is so great as to require exclusion of state law unless Congress has provided otherwise.*

Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1356 (1972) (emphasis added).

The Second Circuit recognized that the challenged New York statute accommodated the special interests of labor and conflicted with federal labor policy.[6] Conceding the existence of such a conflict, the court below examined congressional intent. Notwithstanding this Court's clear directives that no state interference with the federal labor policy of free collective bargaining will be countenanced unless Congress has "affirmatively indicated" that states may act, the court below held that New York's interference with the collective bargaining process was valid because Congress had failed to expressly prohibit such interference.

The circuit court's error is underscored by this Court's recent analysis in *White Motor*. Justice White, in reviewing the Court's earlier opinion in *Local 24, International Brotherhood of*

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[6] Regarding the payment of unemployment insurance benefits to strikers, the circuit court said that "the matter has long been a political 'hot potato'" and that it "has been a significant political issue since the early 1930s." 566 F.2d at 394, 395.

Teamsters v. Oliver, supra, wrote that "The opinion ... recognizes exceptions to this general rule [prohibiting state interference in the collective bargaining process]. One of them ... was the situation *where it is evident that Congress intends a different result.*" 46 U.S.L.W. at 4299 (emphasis added). In *White Motor,* the majority found that Congress had expressly provided by statute that states could regulate pension funds even if interference with collective bargaining agreements resulted.[7]

In contrast, the court below assumed that interference with federal labor policy was permissible unless it could be shown that Congress intended otherwise. The court below found "a positive expression of congressional intent [to permit states to pay benefits to strikers] is lacking ....", 566 F.2d at 391, and concluded that "Our review of the relevant legislative history discloses no clear preemptive intent." *Id.* at 395. Under the standards of labor law pre-emption established by this Court, in light of the acknowledged conflict between New York's statute and federal labor policy, these findings should have compelled the invalidation of the New York law. In other words, the Second Circuit improperly required Petitioners to prove that Congress had intended to forbid payment of unemployment insurance benefits to strikers. Since it is the state that must demonstrate positive evidence of congressional intent to permit interference with federal labor policy, the decision of the court below was incorrect.

[7] The same analysis was shared by the dissent. Justice Stewart wrote that the majority appeared to concede that the state's interference in the collective bargaining process "would be pre-empted by the federal labor laws if Congress had not somehow indicated that the State was free to impose this particular modification." 46 U.S.L.W. at 4300.

POINT II

Congress has not demonstrated an intention to allow the states to grant unemployment insurance benefits to strikers and thus to disrupt the balance of economic power which lies at the heart of the collective bargaining process.

Because the court below was looking for evidence of congressional intent *to prohibit* the payment of unemployment insurance benefits to strikers when it should have been looking for evidence of a clear intent *to permit* interference with federal labor policy, it construed congressional silence as evidence of an intention to carve out an exception to the doctrine of federal labor pre-emption. The circuit court's drawing inferences from congressional inaction reflects a recurring error in its opinion. This Court has repeatedly stated:

> [N]onaction by Congress affords the most dubious foundation for drawing positive inferences .... Whether Congress thought the proposal unwise ... or unnecessary, we cannot tell; accordingly, no inference can properly be drawn from the failure of the Congress to act.

United States v. Price, 361 U.S. 304, 310-13 (1960). *See also Waterman S.S. Corp. v. United States,* 381 U.S. 252 (1965); *United States v. Philadelphia National Bank,* 374 U.S. 321 (1963). Notwithstanding this general rule of statutory construction, the court below was persuaded by Congress's *failure* to expressly prohibit the payment of unemployment insurance benefits to striking employees that it intended to allow the states to grant such benefits.

In arriving at its conclusion that legislative history evidences a congressional intent to tolerate the payment of unemployment insurance benefits to strikers, the court below reached a different result from every other court which had considered the issue. *Grinnell Corp. v. Hackett,* 475 F.2d 449 (1st Cir. 1973), *cert. denied,* 414 U.S. 858 and 414 U.S. 879 (1973) (hereinafter *"Grinnell"*); *American Broadcasting Companies, Inc. v. New York State Department of Labor,* Civ. No. 77-2995 (S.D.N.Y.

1977); *New York Telephone Co. v. New York State Department of Labor*, 434 F. Supp 810 (S.D.N.Y. 1977), *rev'd*, 566 F.2d 388 (2nd Cir. 1977); *Hawaiian Telephone Co. v. State of Hawaii Department of Labor and Industrial Relations*, 405 F.Supp. 275 (D. Hawaii 1975), *cert. denied*, 46 U.S.L.W. 3599 (March 27, 1978) (hereinafter *"Hawaiian Telco"*). *But see Olin Corp. v. State of Illinois Department of Labor*, 443 F.Supp. 366 (S.D. Ill. January 9, 1978), *appeal dismissed*, ____F.2d____ (7th Cir. March 21, 1978). Examination of the legislative history presented to the court below clearly demonstrates that there was no warrant for finding congressional intent to permit interference in the collective bargaining process resulting from the payment of unemployment insurance benefits to strikers.

A. *Enactment of the NLRA and the Social Security Act without express exclusion of benefit payments to strikers.*

Although the NLRA is silent on the subject of unemployment insurance benefits, the Social Security Act of 1935, 42 U.S.C. §§501 *et seq.*,[8] specifies three classes of individuals to whom states could not deny benefits; strikers are not one of these classes. The court below inferred that because Congress had the opportunity to expressly exclude strikers, but did not, it intended to permit the states to intrude upon free collective bargaining by paying such benefits. There is no warrant for this conclusion.

Established in response to a nationwide unemployment problem, the Social Security Act was intended to "substitute for wages lost during a period of unemployment *not the fault of the employee.*" *California Department of Human Resources Development v. Java*, 402 U.S. 121, 130 (1971) (emphasis added).

[8] The act is now known as the Federal Unemployment Tax Act. 26 U.S.C. §§ 3301-09.

The portion of the Social Security Act upon which the circuit court relied provides:

> Compensation shall not be denied ... to any otherwise eligible individual for refusing to accept *new work under any of the following conditions:*
>
> (A) *if the position offered is vacant due directly to a strike, lockout, or other labor dispute;*
>
> (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;
>
> (C) *if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.*

25 U.S.C. §3304 (a)(5) (emphasis added). The circuit court positively inferred from Congress's failure to expressly prohibit the payment of unemployment insurance benefits to strikers in the Social Security Act that it intended to tolerate the conflict between statutes permitting such payments and national labor policy.[9] In drawing this conclusion, however, the court incorrectly applied the maxim expressio unius est exclusio alterius to the Social Security Act provision set forth *supra*.

The court's rationale is reminiscent of that maxim because it assumed from Congress's painstaking specification of certain individuals to whom the states cannot deny benefits that Congress must have intended to allow the states to grant benefits to strikers. If it had intended to do so, the court apparently reasoned, Congress could — and would — have ex-

[9] If Congress had intended to include strikers among those to whom compensation could not be denied, it could easily have omitted the modifier "new" (work). Express provision for the receipt of benefits is found elsewhere. 7 U.S.C. § 2014 (c) 1972 Supp., 45 U.S.C. § 351. See infra, pp. 25-26. Therefore, 26 U.S.C. § 3304 (a) (5) could just as easily be construed as a refusal to condone the payment of unemployment benefits to st kers.

pressly proscribed the granting of such benefits. The Court's application of the expressio unius doctrine, however, was incorrect because the Social Security Act addressed itself only to the issue of who should be *entitled* to unemployment insurance benefits, and not to that of who should be *denied* benefits.

In this provision Congress was only reinforcing the principle of neutrality in labor relations with which the New York law admittedly interferes. The design of 26 U.S.C. § 3304 (a) (5) (A) was to prevent state unemployment laws from forcing otherwise neutral third parties into the role of strikebreakers before they could receive benefits. Similarly, 26 U.S.C. § 3304 (a) (5) (C) prevents a state from requiring a party to accept work in a non-union shop before he could receive benefits. Thus, from clear congressional mandates that states follow a neutral policy, the court below anomalously found proof of congressional intent to condone violations of such neutrality.

The Second Circuit relied upon this Court's opinion in *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977) (hereinafter "*Hodory*") to support its construction of 26 U.S.C. § 3304 (a) (5). That case examined the issue of whether a state statute *barring* the payment of unemployment insurance benefits to strikers was pre-empted by the Social Security Act or the Federal Unemployment Tax Act. This Court reviewed the legislative history of the Social Security Act and 26 U.S.C. § 3304 (a) (5) to decide if Congress intended, when it enacted those laws, to forbid the states from denying unemployment benefits to innocent parties unemployed due to a strike. This Court held that "neither the Social Security Act nor the Federal Unemployment Tax Act intended to restrict the States' freedom to legislate in thise area." 431 U.S. at 488-489. However, the Court expressly declined inquiry into the pre-emptive effects of the NLRA upon the disputed statute, presumably leaving that issue for a case such as the one at bar. *Id.* at 475, n.3.

Moreover, even if this Court had declared in *Hodory* that the Ohio statute was not pre-empted by the NLRA, the issue in this

case would not be decided. The Ohio statute does nothing more than maintain the neutrality required by the NLRA. In fact, this Court pointed out in *Hodory* that the disqualification in the Ohio statute was at least in part justified by the state's desire to remain neutral in labor disputes. *Id.* at 492. It remains neutral in labor disputes. *Id.* It reinforces – and is therefore compatible with – the principle of free collective bargaining which underlies federal labor relations. That Congress has allowed the states to disqualify those involved in a labor dispute from receipt of unemployment insurance benefits does not even subtly imply that it intended to permit the states to grant direct and substantial economic benefits to strikers at the expense of their employer. Therefore, *Hodory* does not support the holding of the court below.

B. *Enactment of the NLRA and the Social Security Act without express exclusion of benefit payments to strikers despite testimony before a congressional committee urging that Congress forbid the payment of benefits to strikers.*

The court below believed that the failure of Congress to expressly forbid benefit payments to strikers in either the NLRA or the Social Security Act "takes on additional significance in light of the fact that it had been urged to do so." 566 F.2d at 392. The court also noted that the Senate Committee Report on the Social Security Act provided that "the States are left free to set up any unemployment compensation system they wish . . . ." *Id.*

The weight accorded the existence of some testimony before a congressional committee by the Second Circuit reflects an unrealistic view of the legislative process. According to the leading authority on statutory interpretation, "In view of the great length of the records of many committee hearings, the probative force of particular entries in them may not be great." 2A Sutherland, *Statutory Construction* § 48.10 at 209 (4th ed., C. Sands 1973). Similarly, although "statements of interested

parties appearing at committee hearings urging changes ... have been admitted as evidence, ... in view of the possibility that the changes were unnecessary because the assumed interpretation was erroneous, these statements are very weak evidence that the legislature adopted the determination." *Id.* at 210.

In its lengthy review of the relevant legislative history the *Hawaiian Telco* court addressed the significance of such testimony:

> Careful examination of the legislative record, however, does not reveal whether Congress ever expressly considered these recommendations, all of which were contained in lengthy written reports, and none of whose proponents urged them upon the congressional attention during hearings.

405 F. Supp. at 285. Quite simply, the Second Circuit was incorrect in finding the hearing statements probative of congressional intent.

C. *Congress was aware of the New York statute when the NLRA and the Social Security Act were enacted.*

The court below also found it "particularly noteworthy" that Congress was aware of the New York statute when the NLRA and the Social Security Act were enacted. In fact, the New York law did not take effect until January 1, 1936, when the first employer taxes were levied.[10] Moreover, benefits could not have been received until January 1, 1938. More importantly, however, there is absolutely no indication that Congress approved of, or was even aware of, the provision according benefits to strikers.

[10] Thus the court below erred when it stated that the New York statute took effect on April 25, 1935, "two months before the NLRA and almost four months before the Social Security Act." 566 F.2d at 393. The statute was only *enacted* in April.

Absent such a showing of intent, an inference, even from inaction, is unjustifiable, let alone "particularly noteworthy."[11]

D. *Enactment of the Taft-Hartley Act without an express exclusion of benefit payments to strikers although the House bill had such an exclusion.*

The court below sought to infer congressional intent from the legislative history of the Taft-Hartley Act. The House bill contained a provision expressly excluding the payment of benefits to strikers. An accompanying report described the payment of such benefits as a "perversion of the purposes of the social security laws." H.R. Rep. No. 245, 80th Cong., 1st Sess. 12 (1947). The Senate version of the bill omitted the exclusion without explanation. This omission was ostensibly regarded as probative by the Court of Appeals. 566 F.2d at 394.

Unlike the court below, the First Circuit in *Grinnell* evaluated the impact of the deletion:

> Given this silence, the enormous political controversy surrounding the Taft-Hartley Act, and the consequent need for compromises, perhaps unreasoned or hasty, we cannot read this deletion and the subsequent approval of the conference bill as specific congressional resolution of the problem.

475 F.2d at 455. Thus, the First Circuit correctly applied the interpretive rule that legislative silence is a weak tool of construction. Indeed, the House Report may well be a more positive indication of congressional intent, given the intense political

[11] The court below also noted the Social Security Board's approval of New York's statute. It is unclear what, if any, weight was accorded this fact in inferring congressional intent since the court below acknowledged that its significance was "limited" because the Board was "required to approve all laws that met the minimum requirements of 29 U.S.C. § 3304 (a)." 566 F. 2d at 394. More directly, the Court in *Hawaiian Telco* stated, "[t]his fact is immaterial, since the Board was mandated to approve all state laws that met minimum conditions specified by Congress." 405 F. Supp. at 285.

pressures surrounding the legislation. Absent any reason in the legislative history for omitting the provision, there is again, no basis for inferring intent.

E. *Proposed amendment of the Federal Unemployment Tax Act to discontinue benefit payments to strikers.*

Finally, the court below relied upon the failure of Congress to amend the Federal Unemployment Tax Act in 1969 to prohibit the payment of benefits to strikers and a speech given to the House floor by Representative Mills. The probative value of this evidence was also considered by the *Grinnell* court;

> We are aware of the importance and power of the House Ways and Means Committee and of the significance of its Chairman's statements on bills within its jurisdiction. Yet, in the absence of any floor amendment or debate related to that particular change in either house, and of any real consideration of the issue at any level in the Senate, we cannot take the House Committee's deletion, and Congress' subsequent approval of the substitute bill, as a clear indication of the intent of the entire Congress not to preempt unemployment payments to strikers.

475 F.2d at 456.

Again, there is a complete lack of affirmative evidence of congressional intent to permit the conflict with federal labor policy that results from the operation of the New York statute, a deficiency common to all the evidence marshaled by the court below in attempting to ascertain congressional intent.

As indicated above, the court below should have been looking for affirmative evidence of intent to permit payment of benefits of strikers. Even applying the incorrect standard that it did, not one of the items regarded by the court below as supporting a finding of intent is unambiguous. Particularly in light of the circuit court's recognition that this issue has long been a political "hot potato," it is difficult to understand how it could interpret such legislative inaction as warranting the conclusion

that Congress never intended to prevent the states from regulating in this area.

F. *There is substantial evidence that Congress did not intend to grant unemployment benefits to strikers.*

As set forth in Point I above, the policy of neutrality in labor relations prohibits the payment of unemployment benefits to strikers. Whenever Congress has departed from this policy, it has explicitly so indicated. Nonetheless, the court below paid no deference to this evidence that if Congress had intended states to permit strikers to receive benefits, it expressly would have so provided.

When Congress set uniform eligibility standards under the Food Stamp Act of 1964, 7 U.S.C. §§ 2011 *et seq.* it enacted the following proviso:

> Refusal to work at a plant or site subject to a strike or a lockout for the duration of such strike or lockout shall not be deemed to be a refusal to accept employment.

7 U.S.C. § 2014 (c) (1972 Supp.).

Similarly, Congress expressly stated that states are free to determine if benefits under the Aid to Families with Dependent Children program, 42 U.S.C. §§601 *et seq.* may be denied to the children of strikers. *Batterton v. Francis*, 432 U.S. 416 (1977).

Benefits under the Food Stamp Act and Aid to Families with Dependent Children vastly differ from unemployment insurance. In the former the basis for the payments is need. Moreover, to the extent that there is interference with the policy of neutrality, it is the taxpayers who make the payments. Unemployment insurance is not awarded on the basis of need and it offends the policy of neutrality by requiring the employer to subsidize the very people with whom it is supposed to be freely bargaining. The circuit court paid no deference to these distinctions in its opinion.

Again, under the Railroad Unemployment Insurance Act, *as amended*, 45 U.S.C. §§ 351 *et seq.*, Congress has expressly provided that striking railway employees may receive benefits (although only after the arbitration system has been exhausted).

With respect to these examples of express congressional intent which result in the readjustment of the parties' bargaining power, the Court below only regarded them as indicative that Congress permits payment of benefits to strikers.[12] They are obvious, of course, as other courts which have considered the issue have found, at least equally indicative of a general policy to prohibit such payments unless Congress expressly authorizes them.

In the *only* instance where it has expressly considered the issue, the District of Columbia unemployment insurance law, Congress decided that strikers were ineligible to receive unemployment benefits.[13] Enacted simultaneously with the Social Security Act of 1935, this legislation is particularly probative because it was designed to "serve as a model to the States, to guide them in the enactment of sound unemployment-compensation legislation." H. Rep. No. 858, 74th Cong. 1st Sess. 8 (1935). Even if this is not conclusive evidence of congressional intent on the question at bar, it is at least directory of what that intent was, and certainly precludes any clear finding of congressional intent to permit benefit payments to strikers.

Thus, aside from the evidence which the court below found persuasive, it curiously skirted evidence indicating that Congress did not intend to permit strikers to receive unemployment benefits.

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[12]This use of congressional action is curiously inconsistent with the court's use of congressional inaction.

[13]Public Law 386, 49 Stat. 946 (1935), although amended, has always excluded unemployment benefits to strikers, Act of Aug. 28, 1935, ch. 794, § 10 (a), 49 Stat. 950; Act of June 4, 1943, ch. 117, § 10 (f), 57 Stat. 115; and Act of Aug. 31, 1954, ch. 1139, § 10 (f), 68 Stat. 995. The District of Columbia law currently provides (D.C.C. § 46-310 (f)):

> An individual shall not be eligible for benefits with respect to . . . [unemployment] as a result of a labor dispute still in active progress . . . .

In view of the foregoing legislative history, it is difficult to understand how the Second Circuit could find a clear legislative intent to permit the payment of unemployment insurance benefits to strikers.

Much more critical and exhaustive treatments of legislative history were undertaken in *Grinnell* and *Hawaiian Telco.* Perhaps the most apt summary of this history is contained in the First Circuit's opinion:

> [G]iven the ability of Congress to articulate that intent [to permit the payment of benefits] in other programs, one might also infer that its silence in the unemployment compensation statute was indicative of a contrary intent. That, too, however, is not a reasonable inference, given the pre-1935 policy, the 1935 Acts and the rejection of explicitly prohibitory legislation in both 1947 and 1969. The most that can fairly be said, in the face of this legislative record, is that Congress has been and presently is aware of the problem, has had the opportunity to resolve it, and has acted in closely analogous circumstances.

475 F.2d at 457.[14]

Acceptance of the First Circuit's analysis leads to the inescapable conclusion that the Second Circuit must be reversed, since the undeniable interference of the statute sub judice with the collective bargaining process cannot be countenanced absent clear congressional intent to do so. The *amici* urge this Court to accept the analysis of the First Circuit and to reverse the decision of the court below.

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[14] Professor Cox's article lends support to Judge Coffin's analysis, for it notes that "Congress seems able to enact legislation dealing with labor-management relations only in response to a strong swell of public opinion." Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1377 (1972).

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Second Circuit Court of Appeals.

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Respectfully submitted,

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